IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL CASE No. 145 OF 2021

(Arising from the District Court of Serengeti at Mugumu in Economic Case No. 228 of 2020)

PETRO CHACHA @ KICHERE ..... **APPELLANT**

Versus

REPUBLIC ..... **RESPONDENT**

JUDGMENT

14.03.2022 & 11.04.2022
Mtulya, F.H., J.:

Mr. Petro Chacha @ Kichere (the appellant) was convicted by the **District Court of Serengeti at Mugumu** (the district court) in **Criminal Case No. 228 of 2020** (the case) on 29th day of July 2021 for the crime of unnatural offence contrary to section 154 (1) (a) & (c) of the **Penal Code** [Cap. 16 R.E. 2019] (the Code). After the conviction and mitigations, the district court sentenced the appellant to thirty (30) years imprisonment and pay compensation to the victim at the tune of Tanzanian Shillings Five Million Only (5,000, 000/=).

The decision aggrieved the appellant hence preferred the present appeal complaining on nine (9) matters to be resolved by this court to the finality. In ground number two (2) and eight (8) of the petition of appeal, the appellant complains on breach of the

principle of natural justice and denial of the right to call witnesses in defence respectively. Similarly, on ground number two (2) of the appeal, the appellant also complains on non-consideration of the defence evidence during the drafting of judgment and delivery of the same, which is also part of the right to be heard.

The appeal was scheduled for hearing on 14th March 2022 and when the parties where invited to take the floor of this court through teleconference, and after a brief submission of the appellant on his points of protest, Mr. Isihaka Ibrahim, learned State Attorney, who appeared for the Republic, noted a crucial fault on the record of the district court and prayed for *trial de novo* for interest of the parties in the case.

In substantiating his assertion, Mr. Ibrahim stated that the victim of the offence is a minor of eleven (11) years, but was not guided well by the district court before producing her evidence hence she breached the law in section 198 (1) of the **Criminal Procedure Act** [Cap. 20 R.E. 2019] (the Act) and section 127 (2) of the **Law of Evidence Act** [Cap. 6 R.E. 2019] (the Evidence Act).

In bolstering his argument, Mr. Ibrahim, cited page 17 of the proceedings in the district court which shows that the victim did not take oath or promised to tell the truth before bringing her evidence during the hearing at the district court. To his opinion, the failure to abide by the cited provisions of the law in the Act

and Evidence Act vitiates proceedings and since evidence of the victim is the key and must be expunged from the record in the present appeal, there would be no any other evidence which points a finger to the appellant. For interest of justice to the parties, Mr. Ibrahim prayed for trial *de novo* and in order to persuade this court to grant the prayer, he cited the authority of the Court of Appeal in **Tanzania Portland Cement Co. Ltd v. Swabi Majigo**, Civil Appeal No 173 of 2019. Replying the submission of Mr. Ibrahim, the appellant did not protest the cited fault and precedent, but declined the prayer on *trial de novo* contending that the Republic had already completed its investigation on the case and the trial was conducted to the finality hence it cannot be granted second investigation period through *trial de novo*.

I have had an opportunity to peruse the record of this appeal. The proceedings of the district court at page 17 recorded on 17th February 2021 shows that the victim is a person of tender age and produced his evidence without oath or promise to tell the truth of the matter. What is displayed on the record is the district court's observation on its own volition in recording the statement without showing what the victim himself had promised to inform the court. This is totally unacceptable and violation of the law in

the provisions of section 198 (1) of the Act and 127 (2) of the Evidence Act.

With regard to remedies available in such circumstances, page 9 and of the precedent of the Court of Appeal in **Tanzania Portland Cement Co. Ltd v. Swabi Majigo** (supra) decided on 2nd September 2021 gives some guidance:

> *This Court has repeatedly emphasized the need of every witness who is competent to take oath or affirmation before reception of his or her evidence in the trial court...otherwise the testimony of such witness amounts to no evidence in law thus it becomes invalid and vitiates the proceedings as it prejudices the parties' case...In the end, we set aside the award, judgment and decree...On the way forward, we direct that the record be remitted back to the CMA for the labour dispute be tried de novo before another arbitrator...*

Before the last year's decision of the cited precedent above delivered by the Court of Appeal, there were plenty of precedents on the subject emanated from the same Court covering both civil and criminal cases (see: **Catholic University of Health and Allied Science (CUHAS) v. Epiphania Mkunde Athanase**, Civil Appeal No. 257 of 2020; **Nestory Simchimba v. Republic**, Criminal Appeal No. 454 of 2017; **Jafari Ramadhani v. Republic**, Criminal Appeal No.

311 of 2017; **Hamis Chuma @ Hnado Mhoja & Another v. Republic**, Criminal Appeal No. 371 of 2015; and **Kabula Luhende v. Republic**, Criminal Appeal No. 281 of 2014).

In the present appeal, the victim (PW1) was competent witness to testify and was required to either take oath or to promise to tell the truth as required by the cited provisions of the Act and Evidence Act, but the district court did not guide him to do the same before reception of his evidence. From the directives of our superior court, such testimony amounts to no evidence, invalid and vitiates the proceedings of the district court. The reason is obvious that it prejudices the parties' case and in the end, the same proceedings and judgment must be set aside in favour of the *trial de novo*.

Having said so, and considering: first, one-third of the appellant's complaints are on the right to be heard which had already moved from natural right through human right and currently constitutional right enacted under article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] (the Constitution); second, the alleged victim is a child and his evidence was faulted by the district court; and finally, this court has additional mandate of ensuring proper application of the laws in the Act and Evidence Act by the courts below, and since there is vivid breach of the law, this court cannot justifiably close its eyes.

It will set aside proceedings and quash the judgment in favour of the proper application of the laws, as I hereby do. I therefore order the case be remitted back to the district court for *trial de novo* before another learned magistrate.

Ordered accordingly.

Right of appeal explained.

F.H. Mtulya
Judge
11.04.2022

This judgment was delivered in chambers under the seal of this court in the presence of the learned State Attorney, Mr. Yesse Temba and in the presence of the appellant, Mr. Petro Chacha @ Kichere through teleconference placed at Serengeti Prison in Mara Region and in the offices of the Director of Public Prosecutions, Musoma in Mara Region.

T.J. Marwa
Ag. Deputy Registrar
11.04.2022